

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75

7532

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Appeal from the United
States District Court
Southern District of
New York

-----x
IN THE MATTER OF

AIRSPUR CORPORATION, a/k/a
AIRSPUR NEW YORK,

Docket No.
75-7532

Bankrupt.
-----x

BRIEF OF APPELLEE BANKERS
TRUST COMPANY AS TRUSTEE

B
P/S

WHITE & CASE, ESQS.
14 Wall Street
New York, New York 10005

P. B. Konrad Knake
Peter M. Collins

Of Counsel



3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x
:
IN THE MATTER OF
:
AIRSPUR CORPORATION, a/k/a Docket No. 75-7532
AIRSPUR, NEW YORK, Bankrupt. :
----- x

BRIEF OF APPELLEE BANKERS
TRUST COMPANY AS TRUSTEE

TABLE OF CONTENTS

	<u>Pages</u>
STATEMENT OF ISSUE PRESENTED FOR REVIEW WHETHER THE BANKRUPTCY COURT ERRED IN REFUSING TO DISMISS THE TRUSTEE'S COUNTERCLAIM FOR LACK OF JURISDICTION OVER THE PERSON OF BANKERS TRUST COMPANY	1
STATEMENT OF THE CASE	1
STATEMENT OF RELEVANT FACTS	3
ARGUMENT	
I THE BANKRUPTCY JUDGE ERRED IN REFUSING TO DISMISS THE AIRSPUR TRUSTEE'S COUNTERCLAIMS FOR LACK OF JURISDICTION OF THE PERSON OF BANKERS TRUST COMPANY.	4
II THE TRUST ASSETS ADMINISTERED BY BANKERS TRUST MAY NOT BE DEPLETED BY A COUNTERCLAIM BY THE AIRSPUR TRUSTEE AGAINST THE TRUST ESTATE.	8
CONCLUSION.	14

TABLE OF CASES CITED

	<u>PAGES</u>
<u>Bank of New York v. Shillito</u> , 14 N.Y.S.2d 458, 462 (Surr. Ct. West. Co. 1939)	10
<u>Bingen v. First Trust Company of St. Paul</u> , 103 F.2d 260, 265 (8th Cir. 1939).	10
<u>Chambers v. Cameron</u> , 29 F. Supp. 742 (N.D. Ill. 1939)	6
<u>Cravatta v. Klozo Fastner Corp.</u> , 15 F.R.D. 12 (S.D.N.Y. 1953)	6
<u>Erdheim v. Mabee</u> , 305 N.Y. 307, 113 N.E. 2d 433 (1953)	10
<u>Flagg v. Levy</u> , 27 A.D.2d 952, 282 N.Y.S.2d 187 (2d Dept.) affirmed, 21 N.Y.2d 673, 287 N.Y.S.2d 96 (1967)	9
<u>In re Freid's Estate</u> , 71 N.Y.S.2d 304 (Surr. Ct. N.Y. Co. 1947)	10
<u>In re Lowman's Trust</u> , 92 N.Y.S.2d 238 (Sup. Ct. N.Y. Co. 1949)	10
<u>In re Shipman's Will</u> , 179 Misc. 303, 40 N.Y.S.2d 373 (Surr. Ct. Queens Co. 1942)	10
<u>In re Turner's Will</u> , 195 Misc. 331, 90 N.Y.S.2d 481 (Sup. Ct. N.Y. Co. 1949)	10
<u>In re Vanneck's Will</u> , 158 Misc. 704, 286 N.Y.S. 489 (Surr. Ct. N.Y. Co. 1936)	10

	<u>PAGES</u>
<u>Kirchner v. Muller</u> , 280 N.Y.23 (1939)	5, 9
<u>Libby v. Hopkins</u> , 104 U.S. 303 (1881)	6
<u>Martin v. Talcott</u> , 1 App. Div.2d 679, 146 N.Y.S.2d 784 (2d Dept. 1955)	5, 9, 11
<u>Morris v. Windsor Trust Co.</u> , 213 N.Y. 27, 106 N.E. 753 (1914)	6, 7
<u>New York O. & W. Ry. Co. v. New York</u> , 158 F.2d 769 (2d Cir. 1947), <u>cert.</u> <u>denied</u> , 331 U.S. 819 (1947)	6
<u>National City Bank v. Beebe</u> , 131 N.Y.S.2d 67, 75 <u>aff'd</u> , 285 App. Div. 874, 139 N.Y.S.2d 238 <u>appeal dismissed</u> , 308 N.Y. 960, 127 N.E.2d 100 (1955).	11
<u>Nicholas v. Cohn</u> , 255 F.2d 301 (5th Cir. 1958)	6, 7
<u>O'Brien v. Jackson</u> , 167 N.Y. 31, 60 N.E. 238 (1901)	9
<u>Purcell v. Keane</u> , 430 F.2d 1182 (3d Cir. 1970) (Per curiam)	6
<u>Ruzicka v. Rager</u> , 305 N.Y. 191, 111 N.E.2d 878 (1953)	6
<u>Tryforos v. Icarian Development Co.</u> , 49 F.R.D. 3 (N.D. Ill. 1970)	6
<u>United States v. Timber Access Indus. Co.</u> , 54 F.R.D. 36 (D. Ore. 1971)	6
<u>Vass v. Conron Bros. Co.</u> , 59 F.2d 969, 970 (2d Cir. 1932)	5

	<u>PAGES</u>
<u>Western Tie & Timber Co. v. Brown</u> , 196 U.S. 502 (1905)	6
<u>Willis v. Sharp</u> , 113 N.Y. 586 (1889)	11
<u>Wilmington Trust Co. v. Wilmington Trust Co.</u> , 186 Atl. 903 (Del. Ch. 1936)	11
<u>York-Buffalo Motor Express, Inc. v. National Fire & Marine Ins. Co.</u> , 294 N.Y. 467, 63 N.E.2d 61 (1945)	6

TABLE OF STATUTES CITEDPAGERule 13, F.R.Civ.P.

5

TABLE OF OTHER AUTHORITIES CITED

	<u>PAGES</u>
<u>Restatement, Conflict of Laws</u> (2d) §268	10
90 C.J.S. Trusts §160	10
<u>Restatement, Trusts</u> §271A	12

STATEMENT OF ISSUE PRESENTED FOR REVIEW

WHETHER THE BANKRUPTCY COURT
ERRED IN REFUSING TO
DISMISS THE TRUSTEE'S
COUNTERCLAIM FOR LACK OF
JURISDICTION OVER THE
PERSON OF BANKERS TRUST COMPANY

STATEMENT OF THE CASE

This brief is submitted by Appellee Bankers Trust Company as Trustee ("Bankers Trust"). Bankers Trust has submitted separately, together with Appellees Mercantile Commerce Company and Ohio Real Property, Inc., a brief setting forth grounds common to all of them for affirmance of the order of the District Court dated August 6, 1975 and dismissal of the counterclaims asserted against them by the Trustee in Bankruptcy of Airspur Corporation (the "Airspur Trustee").

Bankers Trust submits this supplemental brief to present a further ground for dismissal which is applicable to it because its proof of claim was filed in its capacity as trustee of certain trust funds, the capacity in which it made the loan of \$1,875,000 to Airspur.

Bankers Trust submits that, even if the Bankruptcy Court had summary jurisdiction of the Airspur Trustee's counterclaim, and even if it were not required in the exercise of its discretion to dismiss the Airspur Trustee's counterclaim because of the pendency of the Airspur Trustee's parallel plenary action in the New York State Supreme Court, the counterclaim alleged against Bankers Trust would require dismissal because it is alleged against it in a capacity in which it is not before the Bankruptcy Court.

The District Court (328a n.4) found it unnecessary to reach this question because of its determination in favor of Bankers Trust of the issues discussed in its opinion and because, while briefed and argued in the Bankruptcy Court, this ground had not been addressed--it

apparently was never even considered--by the Bankruptcy Court.*

STATEMENT OF RELEVANT FACTS

Bankers Trust moved to dismiss the Trustee's counterclaim on November 20, 1972. One of the points it urged was that the Airspur Trustee's counterclaim, which was directed against Bankers Trust in its corporate

* Significantly, the Airspur Trustee has avoided discussion of this issue in his Brief, asserting (Trustee's Br. p. 26) that it is somehow not properly before the Court because "the Bankruptcy Court did not decide that issue and Bankers did not raise it in its Notice of Appeal to the District Court." That the Bankruptcy Court did not address this issue does not mean it is not an issue properly before this Court in determining the instant appeal; indeed, the contrary is true. The Airspur Trustee's statement that this issue was not raised in Bankers Trust's Notice of Appeal to the District Court is inexplicable. Since a statement of issues is not required in the Notice of Appeal to the District Court, but in the Designation of the Record on Appeal and Statement of Issues, presumably the Airspur Trustee is referring to Bankers Trust's Designation dated September 16, 1974. The issue here argued is set forth explicitly in that Statement as Item No. 2 on page 2. Of course, the issue was thereafter briefed by both Bankers Trust and the Airspur Trustee before the District Court.

capacity, could not be asserted against Bankers Trust as trustee, the capacity in which it had filed its proof of claim and in which it was before the Bankruptcy Court. On December 7, 1972 counsel for the Trustee moved to amend his objection to substitute the name "Bankers Trust Company, as Trustee" for Bankers Trust Company wherever it appeared (289a). The motion was opposed by Bankers Trust (295a) and was granted with the express proviso that the change in designation of capacity was without prejudice to Bankers Trust's position on its motion, and without waiver of any claim of lack of jurisdiction over the person of Bankers Trust Company. The order so recites (298a).

ARGUMENT

I

THE BANKRUPTCY JUDGE ERRED IN REFUSING
TO DISMISS THE AIRSPUR TRUSTEE'S
COUNTERCLAIMS FOR LACK OF
JURISDICTION OF THE PERSON
OF BANKERS TRUST COMPANY

Even if the Bankruptcy Court would otherwise have jurisdiction of the subject matter of the counterclaim, it has no jurisdiction of the person of Bankers Trust for

that purpose. Bankers Trust filed a proof of claim in this proceeding as trustee for certain pension trusts it was administering. The Airspur trustee seeks to hold Bankers Trust in its non-fiduciary capacity liable in the amount of \$6,208,904 for its alleged failure to prevent mismanagement of the company. The Bankruptcy Court may not entertain this claim because Bankers Trust is before that court in its fiduciary capacity only.

It is fundamental that "for their torts trustees . . . are liable in their individual, and not in their representative capacity." Kirchner v. Muller, 280 N.Y. 23, 28 (1939); Martin v. Talcott, 1 App. Div. 2d 679, 146 N.Y.S.2d 784 (2d Dept. 1955). "Under the law of New York no action may be maintained against a trustee as such. . . . If a trustee makes a contract, the obligee must sue him individually . . . [citing cases]." Vass v. Conron Bros. Co., 59 F.2d 969, 970 (2d Cir. 1932). While Bankers Trust Company filed its claim as trustee for certain pension trusts, the purported counterclaim can be asserted against Bankers Trust Company only in its individual capacity.

Rule 13 of the Federal Rules of Civil Procedure has been applied to prohibit a counterclaim against a party

in a capacity other than the one in which he is a party to the litigation. Where the plaintiff makes a claim in his individual capacity, a counterclaim against him in a representative capacity will not lie, and conversely where the claim is brought in a representative capacity there is no jurisdiction over the plaintiff individually. Purcell v. Keane, 430 F.2d 1182 (3d Cir. 1970) (per curiam); Nicholas v. Cohn, 255 F.2d 301 (5th Cir. 1958); United States v. Timber Access Indus. Co., 54 F.R.D. 36 (D. Ore. 1971); Tryforos v. Icarian Development Co., 49 F.R.D. 3 (N.D. Ill. 1970); Cravatta v. Klozo Fastner Corp., 15 F.R.D. 12 (S.D.N.Y. 1953); Chambers v. Cameron, 29 F. Supp. 742 (N.D. Ill. 1939).

Thus, where a plaintiff sues on behalf of an express trust, a counterclaim may not be laid against the plaintiff. Ruzicka v. Rager, 305 N.Y. 191, 111 N.E. 2d 878 (1953); York-Buffalo Motor Express, Inc. v. National Fire & Marine Ins. Co., 294 N.Y. 467, 63 N.E.2d 61 (1945). And in bankruptcy matters, set-offs may not be made against trust funds. See Western Tie & Timber Co. v. Brown, 196 U.S. 502 (1905); Libby v. Hopkins, 104 U.S. 303 (1881); New York O. & W. Ry. Co. v. New York, 158 F.2d 769 (2d Cir. 1947), cert. denied, 331 U.S. 819 (1947); Morris v.

Windsor Trust Co., 213 N.Y. 27, 106 N.E. 753 (1914).

In Nicholas v. Cohn, 255 F.2d 301 (5th Cir. 1958), Cohn had filed certain claims against the bankrupt in his individual capacity. The bankruptcy trustee sought summary jurisdiction of a claim against Cohn as "trustee and guardian of the estate of [his two minor daughters.]" The Fifth Circuit Court of Appeals held that a plenary suit was required, and that there had been no consent to adjudication of the claims against Cohn as guardian for the daughters by reason of his filing of an individual claim on his own behalf.

Bankers Trust filed its claim as Trustee of various trust funds. It is in this capacity that it holds the note which is the basis of the claim filed. The counterclaim is one upon which Bankers Trust could be liable only in its individual capacity, that is, as a tortfeasor in asserted control of the bankrupt. The bankruptcy court does not have jurisdiction over Bankers Trust in its individual capacity, and the counterclaim must therefore be dismissed.

II

THE TRUST ASSETS ADMINISTERED
BY BANKERS TRUST MAY NOT BE
DEPLETED BY A COUNTERCLAIM BY THE
AIRSPUR TRUSTEE AGAINST THE TRUST ESTATE

In opposing Bankers Trust's arguments below, the Airspur Trustee apparently conceded that Bankers Trust was not before the Bankruptcy Court otherwise than in its representative capacity. Instead disregarding the terms of the order permitting amendment of the counterclaim, he argued (Memorandum In Opposition To Claimants' Motions March 26, 1973, pp. 12 et seq.; Memorandum Of Appellee, January 10, 1975 pp. 20 et seq.) that under the counterclaim as amended by the words "As Trustee" the trust assets administered by Bankers Trust could be depleted by a counterclaim against the trust estate. This argument finds no support in the applicable law, and would produce a patently inequitable result.

The Airspur Trustee based his claim of jurisdiction upon the supposed consent of the trust estate implied from a claim filed by Bankers Trust as trustee for money loaned. The effect of this contention is that the beneficiaries have consented to a summary determination so that the trust assets may be used to satisfy any

claims arising from alleged misconduct by Bankers Trust as trustee in failing to properly manage the business of Airspur. It would be consent that if a trustee does something wrong, the trust funds would be liable for any damages.

Certainly there is no express consent by the beneficiaries of the trusts that their assets may be so depleted. Nor may such consent be implied in law, because the law of the State of New York definitively prohibits such claims against a trust estate. Third persons may not look to the trust estate to satisfy their claims.

This fundamental principle has been long recognized by the New York Court of Appeals. Kirchner v. Muller, 280 N.Y. 23, 28, 19 N.E.2d 665 (1939); O'Brien v. Jackson, 167 N.Y. 31, 60 N.E. 238 (1901). The principle continues to be followed by the courts of New York. Flagg v. Levy, 27 A.D.2d 952, 282 N.Y.S.2d 187 (2d Dept.), affirmed 21 N.Y.2d 673, 287 N.Y.S.2d 96 (1967). Martin v. Talcott, 1 A.D.2d 679, 146 N.Y.S.2d 784 (2d Dept. 1955).

The Airspur Trustee in effect conceded this below by his attempts to evade the strictures of New York law. The Trustee cited provisions of the stockholders' and

purchase agreements which state that those agreements shall be governed by and be construed under Delaware law. But the question is not one of construing those agreements, but rather the right of the Airspur Trustee to reach the assets of the trust estate to satisfy the Airspur Trustee's claims for mismanagement of Airspur. It is fundamental that the governing law for the construction, operation and administration of a trust is the law of the domicile of the trust. Restatement, Conflict of Laws (2d) §268. 90 C.J.S. Trusts §160; Bingen v. First Trust Company of St. Paul, 103 F.2d 260, 265 (8th Cir. 1939); Erdheim v. Mabee, 305 N.Y. 307, 113 N.E.2d 433 (1953); In re Vanneck's Will, 158 Misc. 704, 286 N.Y.S. 489 (Surr. Ct. N.Y. Co. 1936); In re Freid's Estate, 71 N.Y.S.2d 304 (Surr. Ct. N.Y. Co. 1947); Bank of New York v. Shillito, 14 N.Y.S.2d 458, 462 (Surr. Ct. West. Co. 1939); In re Lowman's Trust, 92 N.Y.S.2d 238 (Sup. Ct. N.Y. Co. 1949); In re Shipman's Will, 179 Misc. 303, 40 N.Y.S.2d 373 (Surr. Ct. Queens Co. 1942); In re Turner's Will, 195 Misc. 331, 90 N.Y.S.2d 481 (Sup. Ct. N.Y. Co. 1949). It is the law of the forum, in this case New York, which determines the question of who may

be sued. Martin v. Talcott, 1 A.D.2d 679, 146 N.Y.S.2d 784 (2d Dept. 1955). The parties who are necessary to an action are determined by the law of the forum. National City Bank v. Beebe, 131 N.Y.S.2d 67, 75 aff'd, 285 App. Div. 874, 139 N.Y.S.2d 238 appeal dismissed, 308 N.Y. 960, 127 N.E.2d 100 (1955).*

Thus New York law clearly applies, and any attempt the Trustee may make to argue against the New York cases as contrary to the "modern trend" avails nothing. Apparently as a last resort, the Trustee cited to the District Court (Memorandum of Appellee, January 10, 1975, p. 24) the single case of Willis v. Sharp, 113 N.Y. 586 (1889) for the proposition that where a trust agreement permits the general credit of the trust to be used in furtherance of a business venture, a suit may be maintained directly against the trust. But that case (which recognized the rule followed in the New York cases cited above) related

* If there were any need to turn to Delaware law, Delaware clearly holds that problems concerning management of a trust are referable to the jurisdiction where the trust is located. Wilmington Trust Co. v. Wilmington Trust Co., 186 Atl. 903 (Del. Ch. 1936). Here that jurisdiction is New York.

to trade debts incurred at the clear instruction of a testator in the continued operation of the testator's business, and has no application here.

The Trustee's citation in the District Court below (Memorandum of Appellee, January 10, 1975, p. 22) to comment a of Restatement, Trusts §271A is unavailing, even were such "modern trend" to be adopted in New York. That section of the Restatement is headed "Other Situations Where It Is Equitable to Permit Satisfaction Out of the Trust Estate", and the section permits satisfaction of a creditors's claim out of the trust estate "if it is equitable to permit him to do so . . ."

The Airspur Trustee's claim is barren of any facts upon which it can be found equitable to deplete the trust assets further by requiring the trust funds to be used to indemnify errors in management which resulted in losses to Airspur. Certainly the trust estate has not been benefitted in any way, and to the extent that the claims filed are not paid, the trust estate has only suffered losses.

If further "policy" grounds are pertinent to this Court's decision on this issue, one need only consider the results were the Airspur Trustee's contentions

to be the law. A trustee would necessarily ponder making a claim on behalf of the trust if by so doing he were subjecting the assets of the trust to possible depletion through summary proceedings. Such a dilemma should not be countenanced--and is avoided by sound principles of law and equity.

CONCLUSION

Even if this Court were to find that summary jurisdiction existed, and that sound discretion did not require dismissal of the Airspur Trustee's counterclaim, dismissal of the counterclaim would be required because the Bankruptcy Court lacks jurisdiction over the person of Bankers Trust Company.

Dated: New York, New York
December 12, 1975

Respectfully submitted,

WHITE & CASE
Attorneys for Appellee
Bankers Trust Company as
Trustee
14 Wall Street
New York, New York 10005

Of Counsel:

P.B. Konrad Knake
Peter M. Collins

2 Copies Rec'd
12/15/75

Coran Lubowitz & Letman
Attys for Mercantile

2 Copies Rec'd
12/15/75

Loujoy Wasson Judge & Asst
Attorneys for K R Cavens Corp.

2 Copies Rec'd 12/15/75

Glen & Rosen atty for appellant



